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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1611

J. C. SMOTHERS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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J. C. SMOTHERS, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his criminal conviction.

### OPINION BELOW

The opinion of the Court of Appeals is reported at 435 F.2d 209. It is set forth in Appendix A to this petition.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was based on 18 U.S.C. § 3231.

The opinion of the Court of Appeals was filed October 26, 1970, and that Court denied a petition for rehearing *en banc* on December 30, 1970. The text of this order is set forth in Appendix B to this petition. On January 26, 1971, Justice Marshall extended the time for filing this petition until February 28, 1971. This extension was sought on behalf of petitioner by Walter Stewart, petitioner's counsel before the Court of Appeals. On February 22, 1971, Walter Stewart died. On February 24, 1971, petitioner was advised by an assistant clerk of this Court that petitioner had until March 30, 1971 to file this petition. The text of the letter to petitioner is set forth in Appendix C to this petition. Petitioner retained undersigned counsel on March 12, 1971, and said undersigned counsel was of the opinion that the information supplied petitioner concerning the time for filing this petition was in error. Accordingly, on March 16, 1971, petitioner filed an application for extension of time within which to file this petition. On March 23, 1971, this application was denied by Justice Marshall "without prejudice to the filing of a petition for writ of certiorari for review by the Court."

## STATUTORY PROVISION INVOLVED

18 U.S.C. § 1341.

The text of this statute is set forth in Appendix D to this petition.

## QUESTIONS PRESENTED

1. Whether, under the mail fraud statute, 18 U.S.C. § 1341, one can be held to have caused the mailings of commercial paper between two National banks pursuant to a participation agreement between those banks?

2. Whether a scheme to defraud by assignment of false accounts receivable is completed once a bank extends loans to the assignor, credits the account of the assignor in the loan amounts, and permits the assignor to withdraw those amounts?

## STATEMENT OF THE CASE

Petitioner was convicted of 14 separate counts of mail fraud in violation of 18 U.S.C. § 1341, and sentenced to five years imprisonment on each count, to run concurrently, and fined in the total amount of $1,400.[1]

The evidence adduced at trial revealed that petitioner participated in a scheme to fraudulently obtain loans from the First National Bank of Gorham. The mechanics of the scheme were essentially as stated by the Court of Appeals, namely, petitioner directed the preparation of false bills of lading, assignments of nonexistent accounts receivable, and other false documents relating to shipments and sales of coal to various customers of petitioner's company. These documents were presented to the First National Bank of Gorham, whereupon that bank loaned the petitioner

[1] In this Statement of the Case, Petitioner adopts the facts as recited by the Court of Appeals opinion, supplemented by references to the transcript of proceedings where appropriate. Such references to the transcript are cited as "Tr. ——."

sums of money, secured primarily by the accounts receivable, and deposited the loan amounts in petitioner's account (Tr. 63-64; 80-82). Petitioner was permitted to withdraw these amounts (Tr. 81-82; 87; 93; 192).

Petitioner admitted that he directed the preparation of the false documents utilized to obtain the loans in question (Tr. 347).

The customary procedure employed in transmitting the false documents to the First National Bank of Gorham called for the delivery by hand of these documents to the bank by an employee of petitioner's company (Tr. 63). Upon receiving the documents, the bank would enter the aggregate face amounts in the bank's note register as a loan, assign the entry a loan number, and credit the account of petitioner (Tr. 64).

The First National Bank of Gorham was a "correspondent bank" of the First National Bank of St. Louis. This relationship stemmed from a "participation agreement" between the two banks whereby the smaller First National Bank of Gorham could utilize the resources of the larger First National Bank of St. Louis to service the former's loan customers (Tr. 106). In the event that it was presented with a lending oportunity which it could not totally meet under its lending limitations as a National bank, the First National Bank of Gorham would sell a percentage of participation in the loan to the First National Bank of St. Louis. Such arrangement was utilized in the case of petitioner's company (Tr. 106). The mailings which formed the basis of the indictment and conviction were confined to mailings between the two banks under this agreement (435 F.2d at 210-211).

## REASONS FOR GRANTING THE WRIT

This case raises novel, important and timely questions concerning the reach of the mail fraud statute, 18 U.S.C. § 1341, and the degree to which one accused of violating that statute can be said to have knowledge of, e.g., "caused", certain mailings by National banks. No decision by a Court of Appeals has been found which addresses itself to this question; however, the attributing to petitioner of knowledge of certain mailings from one bank to another bank constitutes a situation likely to recur. If the conviction of petitioner is permitted to stand, the application of the mail fraud statute to commercial banking will have been broadened beyond what petitioner submits are that statute's lawful perimeters.

### I. Mailings by a Correspondent National Bank Pursuant to a Participation Agreement With Another National Bank Cannot, in View of the Variables Involved, Be Attributed to a Borrower From Such Correspondent Bank

The correspondent bank relationship between the National Bank of Gorham and the First National Bank of St. Louis was a typical inter-banking arrangement. Such arrangements are employed by smaller, often rural, banks to avoid the proscription of 12 U.S.C. § 84, which provides that a National bank may not, with certain exceptions, loan to any one borrower an amount exceeding 10 per cent of the capital stock of such National bank and 10 per cent of its unimpaired surplus fund. Customarily, upon being presented with a lending opportunity which it cannot meet within its lending limits, a correspondent bank will approach the larger bank with which it has an agreement and offer the latter an opportunity to participate. The Comptroller of the Currency has sanctioned this prac-

tice and afforded guidance as to the manner in which such participations in loans are to be carried out:

> Where a participation in a loan is sold to another bank the agreement may provide that repayment must first be applied to the share sold. Since one of the purposes of such a sale may be to reduce the bank's retention of loans which may exceed its lending limit, the agreement should as a matter of prudent banking practice also provide that, in the event of default or a comparable event defined in the agreement, the participants shall share in all subsequent repayments and collections in proportion to the percentage of participation at the time of the happening of the event.

Comptroller's Manual for National Banks, Ruling 1135 (1968). The percentage of the loan which is assigned to the larger bank will necessarily vary depending upon the percentage which the smaller correspondent bank is able to undertake itself. This latter percentage is in turn governed by such factors as the amounts of other loans outstanding to the particular party in question, the general state of the bank's loan portfolio, and the current level of demand deposits.

The testimony of the banking officers of the National Bank of Gorham and the First National Bank of St. Louis indicates that the correspondent bank relationship between these two institutions was in material respects typical. The lending limitations on the National Bank of Gorham with respect to loans to petitioner required that bank to sell a percentage of the loans in question to the First National Bank of St. Louis and to other banks. The record indicates that the participation of the First National Bank of St. Louis extended to 75 per cent maximum participation (Tr. 106). There is no evidence in the record below of the percentage actually assumed by the First Na-

tional Bank of St. Louis, nor is there evidence below that petitioner was aware of that percentage. Although petitioner knew of a dollar ceiling of loans to him at any one time (Tr. 348), he did not know when or with respect to which transactions the National Bank of Gorham would solicit participation from other banks.

The Court of Appeals relied in part upon this Court's statement in *Pereira* v. *United States,* 347 U.S. 1, 8-9 (1954), that:

> Where one does an act in furtherance of a scheme to defraud, with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, he 'causes the mails to be used', within mail fraud statute.

This application is inapposite to situations involving mailings pursuant to participation agreements between National banks.

Without foresight or knowledge that the use of the mails will follow in the ordinary course of business, one cannot be held to have "caused" the use of the mails within the meaning of the mail fraud statute. This Court should review the instant case to insure that the erroneous findings of knowledge and causation are not applied to other cases involving correspondent banking relationships.

**II. The Utilization of the Participation Agreement by the National Bank of Gorham Was Collateral and Incidental to the Scheme To Defraud**

"There can be no doubt that the indictment charged and the evidence tended strongly to show that petitioner devised and practiced a brazen scheme to defraud . . . .", *Parr* v. *United States,* 363 U.S. 370, 385 (1960), the National Bank of Gorham.

From petitioner's standpoint, the illegal obtaining of funds from the National Bank of Gorham was completed once that bank deposited funds in petitioner's account and petitioner's checks drawn on that account were paid. The evidence adduced indicates that such crediting of petitioner's account immediately followed the presentation of the fraudulently prepared commercial paper (Tr. 64; 81-82). As stated, petitioner was not in a position to know whether the loans deposited in his account would be subsequently sold to the First National Bank of St. Louis under the participation agreement; moreover, such utilization of the participation agreement was immaterial to petitioner, for he had already obtained the proceeds of the scheme. The mechanical details of the participation agreement, such as the time span for any particular transaction, were likewise immaterial. Cf. *Sampson* v. *United States,* 371 U.S. 75 (1962).

In *Kann* v. *United States,* 323 U.S. 88, 94 (1944), this Court held that when the person intended to receive the money has received it irrevocably, and when it becomes immaterial to such person as to how the bank "credited the check" [e.g., account], "it cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

This Court should review the instant case so as to affirm the so-called *Kann* rule and insure that the misapplication which occurred below is not repeated.

### III. The Affirmance of Petitioner's Conviction by the Court of Appeals Extends a Federal Criminal Statute Beyond Its Lawful Reach

It is the policy of the courts to confine a Federal criminal statute to the perimeters of the express Federal interest forming the constitutional basis for such statutes. *Healy* v. *Ratta,* 292 U.S. 263 (1933). This Court has recently had occasion to examine the attempted application of a Federal criminal statute to conduct more appropriately subject to and capable of control by the states. *Rewis* v. *United States,* 39 U.S.L.W. 4363 (1971). Again, this Court is confronted with an attempt to extend the scope of a Federal criminal statute to reach a scheme to defraud which should be reserved for state prosecution.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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SEPTEMBER TERM AND SESSION 1970

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No. 17843

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

J. C. SMOTHERS, *Defendant-Appellant.*

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OCTOBER 26, 1970

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Appeal from the United States District Court for the Eastern District of Illinois.

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Before DUFFY and KNOCH, *Senior Circuit Judges,* and PELL, *Circuit Judge.*

DUFFY, *Senior Circuit Judge.* Defendant Smothers was indicted and convicted by a jury on fourteen separate counts of mail fraud in violation of Title 18 U.S.C. § 1341, often referred to as the mail fraud statute.

The indictment alleged that the defendant intentionally and wilfully devised a scheme and artifice to defraud the First National Bank of Gorham, Illinois, and the First National Bank of St. Louis, Missouri, and that said scheme entailed the preparation of fictitious bills of lading show-

ing rail shipments of coal and other documents as securities for notes payable to the First National Bank of Gorham, for which moneys were received. Further, that as a part of said scheme, defendant caused to be placed in the United States mails the items hereinbefore described, together with a letter signed by an officer of the First National Bank of Gorham and addressed to the First National Bank of St. Louis.

Prior to the date of the trial, defendant filed a motion to suppress a confession or statement made by him to agents of the Federal Bureau of Investigation in the month of January 1968. The trial judge denied this motion after a hearing.

Defendant also filed a post verdict motion for a judgment *n.o.v.* or, alternatively, for a new trial. After hearing oral arguments, the trial judge denied this motion.

The evidence disclosed that defendant founded the Southern Illinois Co-op Sales Company in 1955. From October 13, 1965 to June 1966, the defendant was the president of that company. During the autumn months of 1965, defendant directed his bookkeeper to prepare a false set of financial records for the company. He also directed an employee of the company to prepare false memorandum copies of bills of lading, assignments of non-existent accounts receivable, and other false documents relating to shipments and sales of coal to customers of the company. The sales and shipments referred to in these documents did not, in fact, occur.

Between January and June 1966, defendant's company obtained loans in excess of one million dollars from the First National Bank of Gorham, Illinois. The loans were secured largely by assignment of accounts receivable of the company of which defendant was president. The Gorham Bank transmitted the documents by mail to the First Na-

tional Bank of St. Louis, Missouri, which bank, according to a participation agreement between it and the First National Bank of Gorham, provided the funds for the loans which were made to defendant's company. There were fourteen mailings of such documents between January 26, 1966 and June 22, 1966.

During the period from November 1965 to June 1966, representatives of the St. Louis bank visited defendant's company at Marion, Illinois at intervals of six weeks or less. Defendant usually was present during such visits. The representatives of the bank were shown the financial records of the Company which were false and which had been prepared at the direction of defendant Smothers.

On January 5, 1968, the defendant, together with two attorneys, appeared at the F.B.I. offices to give a statement to three F.B.I. agents. Attorney Goldenhersh departed voluntarily before defendant gave his statement and Attorney Stuckwisch (according to the post-trial affidavits) remained, although in a different room from where the interrogation took place. Defendant's statement was in the nature of a confession although not signed by him.

Defendant argues that the admission into evidence of his statement to the F.B.I. agents violated the requirements of *Miranda* v. *Arizona,* 384 U.S. 436. We disagree. The defendant and his attorney came to the United States Attorney's office on January 5, 1968 by pre-arrangement to give a statement to the F.B.I. Defendant admitted, on the motion to suppress, that he had been advised of his rights by agent Graper and understood them prior to giving any statement. Defendant was not compelled to remain at the F.B.I. offices but could have left any time he wished. The indictment against defendant was not returned until more than six months later. Under these circumstances it is apparent that defendant was not "in custody" within the meaning of the *Miranda* rule. *Freije* v.

*United States,* 408 F.2d 100 (1 Cir., 1969), *United States* v. *Weston,* 417 F.2d 181 (4 Cir., 1969), *Archer* v. *United States,* 393 F.2d 124 (5 Cir., 1968).[1]

Defendant submitted some post-trial affidavits in which it is alleged for the first time that the F.B.I. agents refused to allow defendant's attorney Stuckwisch to be present at the time of the interview at the F.B.I. office. Aside from the inapplicability of the *Miranda* rule to these facts as previously discussed, we need not review this claim at all, since this matter was within defendant's knowledge all along, and he apparently consciously refrained from bringing it to the Court's attention at all stages prior to the post-trial proceedings.

Although we have found that there were no *Miranda* violations in the present case, we shall further review defendant's claim that his confession was not voluntarily given due to an alleged promise of immunity. We recognize and shall apply the well-established rule that a confession, in order to be admissible, must be free and voluntary. *Bram* v. *United States,* 168 U.S. 432 (1897). We recognize that courts will indulge every reasonable presumption against a waiver of fundamental constitutional rights. *Johnson* v. *Zerbst,* 304 U.S. 458. We also note the statement of the Court in *Johnson* v. *Zerbst,* at page 464 "The determination of whether there has been an intelligent waiver of the right . . . must depend in each case upon the particular facts and circumstances surrounding that case, including the background experience and conduct of the accused."

In considering whether defendant voluntarily and intelligently waived his right to remain silent by confessing to the F.B.I. agents, we have in mind that the defendant was

[1] We are not governed by this Court's holding in *United States* v. *Dickerson,* 413 F.2d 1111 (7 Cir., 1969) which applied prospectively only to interrogations occurring after July 28, 1969.

president of an established business concern, engaged in shipping products such as coal. We note also that defendant was aware of the $25,000 debt limit at the Gorham National Bank which existed during this period. He was further aware, by contrast, of the much greater amount which his company had been receiving through the St. Louis bank, and also of the wholly fictitious character of the documents which he had ordered prepared and transmitted to the Gorham bank. In short, there were ample grounds for the trial judge to believe that defendant realized the consequences of his acts and voluntarily gave his statement to the F.B.I. agents.

Defendant's claim as to his statement being induced by an implied promise of immunity is based mainly on an alleged statement to defendant by F.B.I. agent Graper to the effect that Bruno Koeneman was the culprit that the Government was after. Defendant also relies on an alleged promise of immunity by Assistant United States Attorney Kunin, which was allegedly related to defendant by his attorney.

Mr. Kunin testified and denied there was any promise of immunity made by him. Further, he stated that prior to January 5, 1968, the Government had no information which implicated bank president Koeneman who is now deceased.

We hold the findings of the trial court that defendant's confession was not obtained by any promise of immunity are clearly supported by evidence in the record. Admittedly there was a question of credibility involved. The trial court was entitled to believe the testimony of Mr. Kunin and agent Graper. The Court also was entitled to reject the testimony of the defendant on this point. *United States* v. *Ziemer*, 291 F.2d 100, 102 (7 Cir., 1961).

Defendant also argues that the evidence in this case is not sufficient to establish that he caused the mailings from

the Gorham bank to the St. Louis bank. In considering the sufficiency of the evidence, the rule, of course, is that the verdict must be sustained if there is substantial evidence taking the view most favorable to the Government to support it. *Glasser* v. *United States,* 315 U.S. 60.

The Supreme Court construed this portion of the Mail Fraud Statute in *Pereira* v. *United States,* 347 U.S. 1 (1954), p. 8. They there stated: "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen, even though not actually intended, then he caused the mails to be used."

There is evidence in this record from which the jury could determine that defendant had knowledge of the participation by the St. Louis bank on or before November 18, 1965, and could reasonably have foreseen the mailing of fictitious documents to that bank. On that date, the assistant vice president of the St. Louis bank visited the defendant's company. There were other visits by representatives of the St. Louis bank at intervals of six weeks or less from the fall of 1965 to the spring of 1966. The purpose of these visits was to conduct an examination of the financial records of defendant's company. The defendant generally was personally present during these visits.

Prior to such visits, defendant had directed Mr. Oriskovich 'o falsify the company's financial record. Mr. Oriskovich was aware that the St. Louis bank would participate in the loans to defendant's company. The evidence clearly justified an inference by the jury that the defendant was aware of the participation by the St. Louis bank. We think it was reasonably foreseeable that a transmittal of documents between the Gorham bank and the St. Louis bank would occur by mail. These banks were located in different cities and states. Defendant could reasonably foresee the carrying out of a common business practice.

Defendant urges that the mailings from the Gorham bank to the St. Louis bank were not incidental to defendant's scheme to defraud and cites *Parr* v. *United States*, 363 U.S. 370 (1960). We do not think the *Parr* case is pertinent. The mailings from the Gorham bank to the St. Louis bank included memorandum copies of bills of lading which themselves contained false representations. This was not true in *Parr*. It seems clear to us that the mailing of documents containing false representations is incident to a scheme to defraud.

We hold that the judgment of conviction herein is

AFFIRMED

A true Copy:
Teste:

WILLIAM H. PITTMAN
*Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.*

(SEAL)

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Wednesday, December 30, 1970

Before: Hon. F. RYAN DUFFY, *Senior Circuit Judge;* Hon. WIN G. KNOCH, *Senior Circuit Judge;* Hon. WILBUR P. PELL, JR., *Circuit Judge.*

No. 17843

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

J. C. SMOTHERS, *Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of Illinois, Eastern Division

On consideration of the petition of defendant-appellant, J. C. Smothers, for a rehearing by the Court *en banc* in the above entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the defendant-appellant for a rehearing in the above entitled appeal be, and the same is hereby denied.

## APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 24, 1971

E. ROBERT SEAVER
Clerk of the Court

Mr. J. C. Smothers
P. O. Box 247
Marion, Illinois 62959

Dear Sir:

From the information contained in your letter of February 19, you apparently have until March 30 in which to prepare your petition for a writ of certiorari. An extension of time, therefore, would not appear to be necessary at the present time.

Very truly yours,

E. ROBERT SEAVER, *Clerk*
By /s/ EDWARD C. SCHADE
E. C. Schade
*Assistant*

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## APPENDIX D

### Statutory Provision Involved

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.